

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

BURTON W. WIAND, as Receiver for  
VALHALLA INVESTMENT PARTNERS,  
L.P.; VIKING FUND, LLC; VIKING IRA  
FUND, LLC; VICTORY FUND, LTD;  
VICTORY IRA FUND, LTD., and SCOOP  
REAL ESTATE, L.P.,  
Plaintiff,

Case No.: 8:10-cv-245-T-17MAP

v.

DONALD ROWE, individually and as Trustee  
Of THE WALL STREET DIGEST DEFINED  
BENEFIT PENSION PLAN; JOYCE ROWE;  
and CARNEGIE ASSET MANAGEMENT,  
INC.;  
Defendants.

---

**MOTION FOR ENTRY OF A PROTECTIVE ORDER**

Donald H. Rowe, on behalf of himself, Joyce A. Rowe, Wall Street Digest Defined Benefit Pension Plan, and Carnegie Asset Management, Inc., (collectively, “the **Rowe Defendants**”), by and through his undersigned counsel and pursuant to Federal Rules of Civil Procedure 16 and 26, moves for the entry of a protective order staying depositions of the Rowe Defendants and discovery directed to or relating to the Plaintiff’s claims against the Rowe Defendants.<sup>1</sup> In support thereof the Rowe Defendants state:

---

<sup>1</sup> In the alternative, the Rowe Defendants suggest that it may be appropriate to consolidate the Enforcement Action with the Recovery Action for the purposes of discovery relating to the claims raised against the Rowe Defendants in the Rowe Action and direct that those issues be governed by the case management order entered in the Recovery Action. Federal Rule of Civil Procedure 42(a) provides for the consolidation of any or all of the matters at issue in actions pending before the Court to avoid unnecessary cost or delay. The decision to grant or deny a motion to consolidate lies within the broad discretion of the district court. *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1495 (11th Cir. 1985). *See also Mills v. Beach Aircraft Corp.*, 886 F.2d 758 (5th Cir. 1989). Consolidation of discovery relating to the Receiver’s claims against the Rowe Defendant would promote the efficient utilization of the parties and Court’s resources.

1. On January 21, 2009, the Securities and Exchange Commission filed a complaint in *Securities and Exchange Commission v. Nadel*, Case No. 8:09-cv-87 (the “**Enforcement Action**”) for injunctive relief against Victory IRA Fund, Ltd., Victory Fund, Ltd., Viking IRA Fund, LLC, Viking Fund, LLC, Viking Management, LLC, Arthur Nadel, Scoop Capital, LLC, Scoop Management, Inc., Scoop Real Estate, L.P., Valhalla Investment Partners, L.P., and Valhalla Management, Inc.

2. That same day, the Court appointed Burton W. Wiand as Receiver (the “**Receiver**”) over Scoop Capital LLC, Scoop Management, Scoop Real Estate L.P., Valhalla Investment Partners L.P., Viking Fund LLC, and Viking Management (the “**Defendants**”).

3. The Receiver is authorized to “investigate the manner in which the affairs of the Defendants and Relief Defendants were conducted and institute such actions and legal proceedings, for the benefit and on behalf of the Defendants and Relief Defendants and their investors and other creditors as the Receiver deems necessary against those individuals, corporations, partnerships, associations and/or unincorporated organizations, which the Receiver may claim have wrongfully, illegally or otherwise improperly misappropriated or transferred monies or other proceeds directly or indirectly traceable from investors in the Defendants or Relief Defendants, including against their officers, directors, employees, affiliates, subsidiaries, or any persons acting in concert or participation with them, or against any transfers of money or other proceeds directly or indirectly traceable from investors in the Defendants or Relief Defendants; provided such actions may include, but not be limited to, seeking imposition of constructive trusts, disgorgement of profits, recovery and/or avoidance of fraudulent transfers under Florida Statute § 726.101, et seq. or otherwise, rescission and restitution, the collection of

debts, and such orders from this Court as may be necessary to enforce this Order.” *See* Enforcement Action, docket 8.

4. On January 20, 2010, the Receiver brought the instant action (the “**Recovery Action**”) seeking to recover against the Rowe Defendants on behalf of Valhalla Investment, Viking Fund, Viking IRA Fund, Victory Fund, Victory IRA Fund, and Scoop Real Estate.

5. The Recovery Action emanates from the Receiver’s enforcement efforts in the Enforcement Action to recover monies he claims were wrongfully or improperly transferred to the Rowe Defendants.

6. Discovery has not commenced in the Recovery Action. The initial case management conference pursuant to Fed. R. Civ. P. 16(c) is set for June 28, 2010. At the initial case management conference, the Court will address, among other issues, the date for filing a responsive pleading, the date for filing a case management report pursuant to Local Rule 3.05(c)(2)(C) and the management of discovery.

7. The Rowe Defendants are not parties to the Enforcement Action and can not engage in formal discovery in the Recovery Action prior to the initial case management conference.

8. On June 4, 2010, after having brought the Recovery Action but prior to the entry of a Rule 16 scheduling order in the Recovery Action, the Receiver issued subpoenas to SunTrust Banks, Inc., and Northern Trust, NA in the Enforcement Action for the production of financial records of the Rowe Defendants. *See* Exhibit “A.” The subpoenas required production by June 15, 2010.<sup>2</sup>

9. The Receiver did not give notice of the issuance of the subpoenas to the Rowe Defendants.

---

<sup>2</sup> On June 16, 2010, Donald Rowe filed Non-Party’s Objections and Motion to Quash Subpoena Served on SunTrust Banks, Inc. and Memorandum of Law. *See* Enforcement Action, docket 416. The motion is set for hearing on June 25. *Id.* at docket 418.

10. On June 16, 2010, the Receiver's counsel advised that the Receiver intended to depose Mr. Rowe in connection with the Enforcement Action and requested available dates for the deposition. *See* Exhibit "B."

### MEMORANDUM OF LAW

Both the Enforcement Action with the Recovery Action involve the recovery of monies improperly misappropriated or transferred from the investors of the Defendants. However, unlike the Receiver, the Rowe Defendants are not parties to the Enforcement Action. The entry of a protective order staying the depositions of the Rowe Defendants, and any further attempts by the Receiver to obtain discovery related to his claims against the Rowe defendants until after the initial case management conference is fair, reasonable and necessary to prevent the Receiver from obtaining an undue advantage by utilizing the Enforcement Action as a vehicle to obtain discovery. Such a stay would not result in prejudice to the Receiver. Any resulting delay is insubstantial and the Receiver has had the opportunity to utilize discovery in the Enforcement Action to prepare its claims against the Rowe Defendant long before he instituted the Recovery Action. On the other hand, allowing the Receiver to pursue discovery related to the Recovery Action in the Enforcement Action subjects the Rowe Defendants to duplicitous attempts to obtain information and thereby burdens the Defendants and the Court unnecessarily.

The Receiver, like any plaintiff who chooses to file an action in federal court, could expect and accept the consequences of that decision. Rule 26, Federal Rule of Civil Procedure, applies to the Receiver's claims against the Rowe Defendants now that the Receiver has filed the Rowe Action. Rule 26(c), Federal Rule of Civil Procedure, permits protective orders to be issued "for good cause shown" to protect litigants from burdensome or oppressive discovery. provides that for good cause shown, the court may order that disclosure or discovery may be had

only on specified terms and conditions. Rule 26(d), Federal Rule of Civil Procedure, does not permit discovery from any source prior to the case management conference. Rule 30(a)(2), Federal Rule of Civil Procedure, requires that a party obtain leave of court if the party seeks to take a deposition before the time period specified in Rule 26(d). Rule 45(b)(1) of the Federal Rules of Civil Procedure requires that when a subpoena commands the production of documents or things before trial, “before it is served, a notice must be served on each party.” Moreover, the Federal Rules of Civil Procedure limit the amount of discovery in which parties in federal cases can engage in.

The Rowe Defendants are bound by the requirements of Rules 26, 30, and 45. Accordingly, the Rowe Defendants may not commence formal discovery until June 28. Without regard for the requirements of Rule 26, 30 or 45, or any consideration of controlling the cost of the litigation, the Receiver has demanded discovery directly relating to the claims in the Recovery Action, under the auspices of the Enforcement Action and seeks to schedule a discovery deposition of Donald Rowe in the Enforcement action despite its clear relevance to the claims pending in the Recovery Action. The Receiver issued subpoenas for the Rowe Defendants financial records to SunTrust and Northern Trust without providing any notice to the Rowe Defendants.

Requiring Donald Rowe to be deposed twice, first under the auspices of the Enforcement Action and then on the same or similar subject in the Recovery Action constitutes wasteful and duplicative discovery. Moreover, the ongoing conduct of the Receiver in obtaining discovery in furtherance of his claims in the Recovery Action under the auspices of the Enforcement Action, will undermine the limitations on discovery set forth in the case management order that will be entered in the Recovery Action.

As a practical matter, there is no compelling need for the Receiver to ignore Rule 26, 30, and 45 and the orders of the Court in the Recovery Action in favor of pursuing discovery in the Enforcement Action. The Enforcement Action has been pending since January 21, 2009, thus, the Receiver has had ample time to pursue discovery in that action prior to instituting the Recovery Action. Indeed, prior to the commencement of the Recovery Action, the Receiver directed discovery requests to Mr. Rowe in the Enforcement Action. Now that the Receiver has instituted the Recovery Action, however, further discovery relating to those claims should be governed by the procedures for discovery in the Recovery Action.

The Receiver should not be permitted to avail himself of the pending Enforcement Action to pursue discovery of those claims and to obtain documents from third parties without providing the Rowe Defendants with notice. The Rowe Defendants are constrained by the requirements of Federal Rules of Civil Procedure in obtaining discovery in defense of the claims brought by the Receiver in the Recovery Action. The Receiver should be required to play by the same rules.

WHEREFORE, the Rowe Defendants move for the entry of an order (1) staying depositions of the Rowe Defendants and discovery directed to or relating to the Plaintiff's claims against the Rowe Defendants, (2) directing the Receiver to conduct all discovery related to the claims in the Recovery Action only in the Recovery Action and as proscribed by the orders of the Court, (3) protecting the Rowe Defendants from the undue burden that would result from duplicative discovery demands by providing that discovery obtained by in the Enforcement Action may not be sought again in the Recovery Action and that the Rowe Defendants may only be deposed once, regardless of which action the deposition is conducted in, (4) requiring that the Receiver give the Rowe Defendants of the issuance of all subpoenas issued in the Enforcement Action, and (5) for such other relief as is just..

**Certificate of Compliance with Local Rule 3.01(g)**

Pursuant to Local Rule 3.01(g) and Federal Rule of Civil Procedure 26(c)(1), the undersigned certifies she has attempted to confer in good faith with counsel for the Receiver. As of the filing of this motion, the Receiver has not advised the undersigned of his position on the relief requested herein.

DATED: June 21, 2010.

s/ Karen Cox  
Edward O. Savitz  
Florida Bar No. 0183867  
[esavitz@bushross.com](mailto:esavitz@bushross.com)  
Anne-Leigh Gaylord Moe  
Florida Bar No. 18409  
[amoe@bushross.com](mailto:amoe@bushross.com)  
Karen Cox  
Florida Bar No. 456667  
kcox@bushross.com  
BUSH ROSS, P.A.  
1801 North Highland Avenue  
Tampa, FL 33602  
Ph.: (813) 224-9255  
Fax: (813) 223-9620  
Attorneys for Donald H. Rowe

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that on June 21, 2010, I electronically filed the foregoing with the Clerk of the court by using the CM/ECF system. I **FURTHER CERTIFY** that I mailed the foregoing document and the notice of electronic filing and on June 22, 2010, by first-class U.S. Mail to the following non-CM/ECF participant: Arthur Nadel, #50690-018, Metropolitan Correctional Center, New York, 150 Park Row, New York, New York 10007.

s/ Karen Cox